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Supreme Court of the United States

October Term, 1995

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED, in their individual and official capacity as Police Officers employed by the New York City Department of Police,

Petitioners,

against

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED.

1. Whether the Order of the District Court appealed from was a final determination under the "collateral order" doctrine where the Order finally determined the issue of Respondent's determination to withdraw from their representation and indemnification of Petitioners.

Petitioners contend that this question should be answered in the affirmative.

2. Whether the Order of the District Court should be reversed because Respondent's withdrawal from representation and indemnification of Petitioners was without any basis, arbitrary and capricious, and in direct violation of New York General Municipal Law § 50-k, which mandates Respondent, as Petitioners' civil service employer, to represent and indemnify Petitioners as civil servants for claims arising against them in the course of their employment.

Petitioners contend that this question should be answered in the affirmative.

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No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED, in their individual and official capacity as Police Officers employed by the New York City Department of Police,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

This controversy involves a question of legal representation and indemnification between Petitioners, New York City Police Officers, and Respondent CITY OF NEW YORK. The Plaintiff in the original case, ARTHUR SCHWARTZ, is not a party to the present litigation, nor is Defendant FRANK McDERMOTT, because the issue of legal representation and indemnification does not affect any of their rights or interests.

Petitioners TERRANCE COLLINS, JOHN CAIRNEY and DARIN BUNEO (hereinafter Petitioners) respectfully petition

this Court to issue a Writ of Certiorari to review two Orders of the United States Court of Appeals for the Second Circuit.

According to the first Order, dated June 15, 1995, the Second Circuit dismissed an appeal by Petitioners on the grounds that the Order appealed from in the United States District Court for the Eastern District of New York (Hon. REENA RAGGI, J.) was not a final judgment for the purposes of 28 U.S.C. § 1291 and did not fall within the "collateral order" exception to the final judgment rule. A copy of the Order of the Second Circuit dated June 15, 1995 is set forth as Appendix A.

Petitioners moved for rehearing before the Court of Appeals, renewing their contentions that the controversy was squarely within the "collateral order" exception to the final judgment rule. The Court of Appeals below, in the second Order, which was dated August 23, 1995, denied the Petition for Rehearing. A copy of the Order of the Second Circuit dated August 23, 1995 is set forth as Appendix B.

This controversy involves an appeal from an interlocutory Order of the District Court which granted a motion by Respondent CITY OF NEW YORK to be relieved as Counsel for Petitioners, New York City Police Officers. Respondent, as their municipal employer, is obligated to represent and indemnify them in the event they are sued for acts committed within the scope of their employment pursuant to New York General Municipal Law § 50-k.

As Respondent evaded this statutorily-imposed duty, Petitioners requested the Second Circuit to intervene and reverse the Order appealed from as erroneous. The Order, albeit an interlocutory one, finally and conclusively determined the issue involved, because even if the individual Petitioners were

successful in defending themselves in this case, they could not receive reimbursement for attorneys fees under two cases, Mercurio v. City of New York, 758 F.2d 862 (2d Cir. 1985) and Blood v. Board of Education, 121 A.D.2d 128 (1st Dept. 1986).

OPINIONS BELOW

The Opinion of the Court of Appeals which corresponds to Order of June 15, 1995, which dismissed the appeal, is set forth as Appendix C. There was no written Opinion with respect to the denial of the Petition for Rehearing before that Court.

JURISDICTION

As stated above, the Order denying the Petition for Rehearing was entered on August 23, 1995. According to Rule 13.4 of the United States Supreme Court Rules, this Petition for a Writ of Certiorari, having been filed within 90 days of August 23, 1995, is timely. Further, this Court's jurisdiction to review this case rests upon 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

New York State General Municipal Law § 50-k

> 2. At the request of the employee and upon compliance by the employee with the provisions of subdivision four of this section, the city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court including actions under sections nineteen hundred eighty-one through nineteen hundred eighty-eight of title forty-two of the United States code arising out of any alleged act or omission which the corporation counsel finds occurred

while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred.

3. The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim approved by the corporation counsel and the comptroller, provided that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged damages were sustained; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from the intentional wrongdoing or recklessness on the part of the employee.

4. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon (a) delivery to the corporation counsel at the office of the law department of the city by the employee of the original or a copy of any summons, complaint, process, notice, demand or pleading within ten days after he is served with such document, and (b) the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the city based upon the same act or omission, and in the prosecution of any appeal. Such delivery shall be deemed a request by the employee that the city provide for his defense pursuant to this section. In the event that the corporation counsel shall assume an

employee's defense and thereafter the employee fails to or refused to cooperate in the formation or presentation of his defense, the court shall permit the corporation counsel to withdraw his representation ten days after giving written notice to the employee of his intention to discontinue such representation.

New York City Charter § 400(c)(1)

(c) Powers and duties of the board.

1. The board shall have the power to receive, investigate, hear, make findings and recommend action upon complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability. The findings and recommendations of the board, and the basis therefor, shall be submitted to the police commissioner. No finding or recommendation shall be based solely upon an unsworn complaint or statement, nor shall prior unsubstantiated, unfounded or withdrawn complaints be the basis for any such finding or recommendation. [Emphasis supplied.]

New York City Charter § 440(e)

(e) The provisions of this section shall not be construed to limit or impair the authority of the police commissioner to discipline members of the department. Nor shall the provisions of this section be construed to limit the rights of members of the department with

respect to disciplinary action, including but not limited to the right to notice and a hearing, which may be established by any provision of law or otherwise.

STATEMENT OF CASE

On April 16, 1992, the plaintiff in the Courts below, one Arthur Schwartz, illegally parked his car on Oxford Street in Brooklyn, New York. Petitioner Collins, while on duty as a New York City Police Officer, was in the course of issuing a parking summons and placing it on Schwartz' vehicle when Schwartz came out from a store and said, "You're not giving me nothing asshole." Schwartz jumped into his car and drove away. Petitioner Collins got onto his motor scooter and followed the Schwartz vehicle.

Schwartz brought his vehicle to a sudden stop, apparently in the hope that Petitioner Collins, on his motor scooter, would crash into the rear of the Schwartz vehicle. Petitioner Collins was able to timely stop the motor scooter. Schwartz jumped out of his car and said to Petitioner Collins, "You're a dick." Petitioner Collins told him that he was under arrest for disorderly conduct. Schwartz continued to verbally abuse Petitioner Collins.

Schwartz told Petitioner Collins, "I'm not going anywhere with you asshole," and jumped back into his car and drove off. Petitioner Collins followed the Schwartz vehicle and called over the radio for back-up. A police car, containing Petitioner Cairney and Buneo, assisted Petitioner Collins in stopping the Schwartz vehicle.

At the stop, Petitioner Collins told Schwartz to step out of the car because he was under arrest. Schwartz said no. Petitioner

Collins opened the car door from the outside. Schwartz struck Petitioner Collins in the chest, causing him to fall to the ground. He then jumped on top of Petitioner Collins, punching, kicking and clawing at him. Schwartz also fought with the two other police officers on the scene, causing injuries to all three.

Schwartz was taken into custody and charged with Disorderly Conduct and Resisting Arrest. Police Officer Frank McDermott, who was not involved in the incident, was assigned to be the arresting officer, as all three police officers involved in the incident were injured.

Subsequent to his arrest, on January 24, 1993, Schwartz made a complaint against Petitioner in the Civilian Complaint Review Board alleging that Petitioner had used excessive force and had committed assault and battery against him.

On or about July 12, 1993, Schwartz commenced an action under 42 U.S.C. § 1983 claiming compensatory and punitive damages arising out of the incident of April 16, 1992 against the City of New York, the present Petitioners and Police Officer Frank McDermott. Schwartz alleged in the Complaint that certain of the named defendants used excessive force on him certain of the named defendants failed to prevent the use of force during the incident.

Upon being notified of the existence of Schwartz' suit against them, each Petitioner made a timely request for legal assistance from the City of New York, consistent with the provisions of General Municipal Law § 50-k and relevant New York City Police Department rules and regulations. The Police Department made an investigation of the facts and circumstances of the incident of April 16, 1992 involving Schwartz and found the following as to each Petitioner:

> Investigation reveals that at the time of occurrence the member of the service was acting in the proper discharge of duty, was not guilty of misconduct, and charges are not likely to be preferred against the member. Request that Corporation Counsel be assigned to defend the member in this action.

The Corporation Counsel of the City of New York acted upon the recommendation of the Police Department and agreed to represent and indemnify all members of the Department sued by Schwartz. The Corporation Counsel's office was aware of the fact that Schwartz had made a civilian complaint against Petitioners and ascertained that the Review Board's file on the matter indicated that as of May, 1993, the allegations against Petitioners were unsubstantiated, and that there were no allegations against Police Officer McDermott.

The Office of the Corporation Counsel then interposed an Answer on behalf of all Petitioners, dated October 15, 1993, which denied the material allegations contained in Schwartz' Complaint.

By a letter dated November 26, 1993,[1] the Civilian Complaint Review Board (hereinafter CCRB) advised Arthur Schwartz that the Board had investigated his allegations, stating the following:

> After careful review, the Board determined that there was insufficient evidence to clearly prove or disprove the allegations that officers threw you into a van and an officer threatened you. In regard to the allegations that

---

[1]Please note that this letter by the Civilian Complaint Review Board is dated one month after the Office of the Corporation Counsel filed an Answer to Schwartz' Complaint on behalf of the City of New York and all Petitioners.

> an officer cursed, pulled you from your auto, pushed you and beat you, the Board determined that the complaint was substantiated and has recommended that charges be preferred against the subject officer.

On January 25, 1994, another letter from the CCRB was sent to the Police Commissioner. In this letter, it was stated that the CCRB had reviewed the matter on November 17, 1993, and concluded that the case against Police Officer Collins was substantiated. It must be restated that the Board "recommended that charges be preferred against the subject officer." [emphasis supplied.] It should be made clear that the CCRB did not make a similar recommendation as to Petitioners Cairney and Buneo.

This is of significance because the CCRB does not have the power to prefer charges and specifications against a member of the New York City Police Department. Only the Police Commissioner has this power, and in this case, the Police Commissioner chose not to adopt the recommendation of the CCRB. Indeed, rather than bringing charges against Petitioner Collins, the Police Department has promoted him to the rank of Sergeant.

By Notice of Motion dated July 15, 1994, Respondent moved to withdraw as counsel for Petitioners. The Corporation Counsel of the City of New York motivated their attempt to evade the dictates of General Municipal Law § 50-k by elevating the mere recommendation of the CCRB to being somehow equivalent to the Police Department formally lodging disciplinary charges and specifications against Petitioner Collins. Based on this, Respondent argued to the Courts below that it was excused from representing Petitioner Collins.

Given that Petitioners Cairney and Buneo had made statements in harmony with the position of Petitioner Collins, Respondent also took the position that it was excused from representing Petitioners Cairney and Buneo, as well, claiming the presence of a conflict of interest.

Petitioners served and filed opposition papers on or about August 23, 1994. Reply papers were served and filed by Respondent on or about September 14, 1994. On September 16, 1994, argument was had before the Honorable REENA RAGGI, J.

On September 16, 1994, a written Order, signed by Judge RAGGI, was filed, granting Respondent's Motion to Withdraw as Counsel for Petitioners. Petitioners appealed the Order of Judge RAGGI to the Second Circuit.

After oral argument was held on May 8, 1995, the Second Circuit ordered the appeal dismissed, holding that the "collateral order" doctrine did not apply to this appeal. Petitioners, being dissatisfied with the dismissal of their appeal, which occurred on June 15, 1995, filed a Petition for Rehearing.

The Petition for Rehearing, dated June 28, 1995, was denied by the Second Circuit on August 23, 1995. Petitioners now move for a Writ of Certiorari to this Court.

REASONS FOR GRANTING THE PETITION

I. The Order of the District Court appealed from was a final determination under the "collateral order" doctrine where the Order finally determined the issue of Respondent's determination to withdraw from their representation and indemnification of Petitioners.

In its decision dismissing the appeal in this case, the Second Circuit described the "collateral order" doctrine as follows:

> The collateral order doctrine is a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right. Its "reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 430-31 (1985). The doctrine provides that appeals may be taken from prejudgment orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949).
>
> In Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978), the Supreme Court set forth three requirements to fit the exception: the interlocutory order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

In applying the three requirements mentioned in Coopers & Lybrand to this case, there can be no doubt that all three requirements are met. Apparently, the Second Circuit ruled in the manner it did because it was unaware of the fact that even in the event the City is found to have been liable to provide for Petitioners' defense, it may not be ordered to pay Petitioners' attorneys' fees. With all due respect to the Second Circuit, that Court was in error. This issue was conclusively decided in Mercurio v. City of New York, 758 F.2d 862 (2d Cir. 1985).

In Mercurio, it was held that police officers were not entitled to reimbursement by their municipal employers of legal fees incurred in defending civil and criminal charges against them, where there was a claim raised by the City of a conflict of interest between the City and the police officers. This is precisely the situation in the present controversy.

Thus, the order appealed from conclusively determined the disputed question, that is, the question of representation of Petitioners. Therefore, with all due respects, reversal of the order appealed from would not overturn the strict application test mentioned in Richardson-Merrell Inc. v. Koller, cited in the Opinion of the Second Circuit.

As to the second requirement in Coopers & Lybrand, it is submitted that the issue of representation is completely separate from the merits of the action. In this case, there is a complete absence of any evidence that any of the Petitioners violated any rule and regulation of the New York City Police Department. It must be stated that if "the questions turns in part on precisely what the officers did," then the arbitrariness of the City's determination not to represent Petitioners becomes all the more apparent.

It is a fact that none of the Petitioners violated any rule or regulation of the New York City Police Department. That this is so can be seen from the fact that none of the Petitioners were served with any Charges and Specifications alleging any inappropriate behavior on their part in connection with the underlying incident. Indeed, the New York City Police Department has subsequently not only refrained from disciplining Petitioners, but has promoted Petitioner Collins, the party alleged by Plaintiff to have been the most culpable, to the rank of Sergeant, New York City Police Department.

The only hint that any subdivision of the New York City government has expressed dissatisfaction with Petitioners was the Civilian Complaint Investigations Board, which initially recommended to the Police Department that no charges be filed against any member of the Police Department, but later changed its recommendation to suggest disciplinary charges be brought against Petitioner Collins. Up to date, as noted above, the Police Department has declined to follow the recommendations of this Board.

It should be noted that the arbitrariness of Respondent's decision not to represent and indemnify Petitioners is clear, because the Office of the Corporation Counsel chose to follow a recommendation by an agency of the City which had no power to make a binding decision on the question of whether or not Petitioners committed wrongdoing.

Under General Municipal Law § 50-k, Respondent is required to represent and indemnify Petitioners in this 42 U.S.C. § 1983 action. Under this section, the New York City Police Department was the only agency which could make a decision as to wrongdoing on the part of Petitioners. The Civilian Complaint Investigations Board did not have this power, and by relying

upon a mere recommendation by the Board, which was entirely non-binding on the Police Department, the Corporation Counsel committed error and thereby the second requirement in Coopers & Lybrand was met by Petitioners in qualifying for representation and indemnification by Respondent.

As to the third of the Coopers & Lybrand requirements, clearly Mercurio and the New York Supreme Court, Appellate Division, First Department case of Blood v. Board of Education, 121 A.D.2d 128 (1st Dept. 1986) clearly established that the instant order is unreviewable on appeal because, under said cases, the City of New York cannot be "simply...ordered to pay the officers' attorneys' fees." Contrary to the Opinion of the Second Circuit, and unfortunately for Petitioners, their rights, established under General Municipal Law Section 50-k(2), have been irretrievably lost in this process by application of Mercurio and Blood to this controversy.

Thus, the disputed Order is a final judgment as to the issue of representation and indemnification, and the requirements of the collateral order doctrine have been satisfied. This Court ought grant the instant petition in order to further define the "collateral order" doctrine, and in due course, reverse the decision appealed from.

In Williams v. City of New York, 64 N.Y.2d 800 (1985), the New York Court of Appeals stated:

> The issue of whether petitioner's acts were committed within the scope of his public employment and the discharge of his duties raises factual questions (see, Riviello v. Waldron, 47 N.Y.2d 297, 303, 418 N.Y.S.2d 300, 391 N.E.2d 1278). Whether he was so acting and thus was entitled to representation by the Corporation

> Counsel and indemnification by the city are to be determined in the first instance by the Corporation Counsel (see, General Municipal Law Section 50-k[2]) and his determination can be set aside only if it lacks a factual basis and in that sense, is arbitrary and capricious." [emphasis added.]

The New York Court of Appeals, thus, has stated that the Corporation Counsel is allowed to make the initial determination of whether or not it will provide an employee with a defense and whether or not the City will indemnify the employee. In this regard, it must be stated that unless the Corporation Counsel's determination lacks a factual basis, it will not be set aside.

However, the standard set forth in Williams v. City of New York, *supra*, also restricts the Corporation Counsel, because once Corporation Counsel has made the initial determination to provide an employee with a defense and indemnification, it cannot change this determination, unless, the initial determination lacked a factual basis, and was, therefore, in that sense arbitrary and capricious. See, Wong v. City of New York, 174 A.D.2d 486 (1st Dept. 1991).

This Court, as stated above, should utilize this case as a vehicle in which to instruct the Courts of Appeals in all circuits as to a proper definition of the "collateral order" doctrine, so that others situated as Petitioners do not suffer the same deprivation of rights to counsel and indemnification.

II. The Order of the District Court should be reversed because Respondent's withdrawal from representation and indemnification of Petitioners was without any basis, arbitrary and capricious, and in direct violation of New York General Municipal Law § 50-k, which mandates Respondent, as Petitioners' civil service employer, to represent and indemnify Petitioners as civil servants for claims arising against them in the course of their employment.

Respondent cannot be permitted to evade the obligation imposed upon it by General Municipal Law § 50-k to represent and indemnify Petitioners in this 42 U.S.C. § 1983 action. With all due respect to the Courts below, the decision appealed from should be reversed and Respondent directed to continue representation of Petitioners and, if necessary, indemnify them in the event such is necessary.

As this matter involves substantial rights of members of the New York City Police Department, the instant Petition for a Writ of Certiorari should be granted. There can be no doubt but that rights to representation and indemnification, which are guaranteed by statute, are substantial and should be upheld. Moreover, given that Petitioners are members of a large category of civil servants, any of whom might find themselves in a situation where baseless allegations are made against them, and where their public employer might find it convenient to evade responsibility inherent in representation and indemnification, this case presents an issue which is not limited to the Petitioners involved.

In this point, Petitioners submit that they have a meritorious case which the Courts below declined to correctly decide. It is the function of this Court to make corrections and to provide

teachings to the federal courts that statutory rights guaranteed by either a State Legislature or Congress must be honored and cannot be readily cast aside. In short, Petitioners' case for representation and indemnification was meritorious.

An examination of the statute makes this clear. See New York State General Municipal Law, Section 50-k. In this case, Petitioners completely complied with the terms of the statute. They timely delivered the Summons and Complaint to the Office of the Corporation Counsel of the City of New York, together with necessary forms, and consistent with the statute, cooperated entirely with the Office of the Corporation Counsel. Unfortunately, Petitioners' compliance with the statute has not been reciprocated by the Respondent in the form of the Corporation Counsel of the City of New York.

It is true that, under the statute, the Corporation Counsel may determine, in the first instance, whether or not an civil servant is entitled to be provided with a defense in a civil case by Respondent, and whether or not that civil servant is entitled to indemnification in the event of an adverse judgment. The standard by which the application of General Municipal Law § 50-k(2) and (3) is to be measured was set forth by the New York State Court of Appeals in Williams v. City of New York, 64 N.Y.2d 800 (1985):

> The issue of whether petitioner's acts were committed within the scope of his public employment and the discharge of his duties raises factual questions (see, Riviello v. Waldron, 47 N.Y.2d 297, 303, 418 N.Y.S.2d 300, 391 N.E.2d 1278). Whether he was so acting and thus was entitled to representation by the Corporation Counsel and indemnification by the city are to be determined in the first instance by the Corporation

> Counsel (see, General Municipal Law Section 50-k[2]) and his determination can be set aside only if it lacks a factual basis and in that sense, is arbitrary and capricious." [emphasis added.]

The New York Court of Appeals, thus, has stated that the Corporation Counsel is allowed to make the initial determination of whether or not it will provide an employee with a defense and whether or not the City will indemnify the employee. In this regard, it must be stated that unless the Corporation Counsel's determination lacks a factual basis, it will not be set aside.

However, the standard set forth in Williams v. City of New York, *supra*, also restricts Respondent, because once Corporation Counsel has made the initial determination to provide an employee with a defense and indemnification, it cannot change this determination, unless, the initial determination lacked a factual basis, and was, therefore, in that sense arbitrary and capricious. See, Wong v. City of New York, 174 A.D.2d 486 (1st Dept. 1991).

It is submitted Respondent has acted improperly in this case in seeking to withdraw from representing Petitioners. In this case, Corporation Counsel has admitted making an initial determination that it would provide a defense and indemnification for Petitioners. Indeed, Corporation Counsel has admitted appearing in this action for Petitioners and has further admitted to serving an Answer for Petitioners.

Under such circumstances, as to the question of the legal representation of Petitioner Collins, Respondent would have to make a strong showing that withdrawal from representation is a warranted course of action, which they have not done. Rather,

Corporation Counsel has not complied with the standard established by the Courts of the State of New York that would allow it to withdraw or change its initial determination.

Specifically, Corporation Counsel has failed to set forth precisely how its initial determination to provide a defense and indemnification for Petitioners was somehow lacking in a factual basis. It is apparent that the burden of proof is clearly upon Corporation Counsel to come forward with evidence to show that its initial determination lacked a factual basis and was arbitrary or capricious.

Corporation Counsel's papers before the District Court below revealed that said office was aware of the CCRB file in this matter. Corporation Counsel admits relying upon this file when that office made its initial determination to represent and indemnify Petitioners. Corporation Counsel has stated that the CCRB file indicated that allegations had been made against Petitioners by Schwartz.

While Corporation Counsel did not mention any other factors that it considered when it made its decision, there were a number of factors it would have had to consider prior to agreeing to provide Petitioners with defense and indemnification. First of all, Corporation Counsel would not have undertaken the defense and indemnification of Petitioners, unless that office had received a recommendation from the Police Department that Petitioners had acted in the scope of their employment, and therefore warranted defense and indemnification. The record before the District Court below clearly demonstrates the existence of such a recommendation from the Police Department.

Next, it is beyond dispute that Corporation Counsel would not have undertaken a defense and indemnification of any of the Petitioners if any departmental charges were pending against them as a result of the underlying incident. Corporation Counsel was clearly aware that no departmental charges were pending against Petitioners at the time it made its initial determination.

Additionally, Corporation Counsel had knowledge that the Police Department had made a special determination that all injuries suffered by Petitioners as a result of the incident were incurred in the line of duty, and were sustained solely due to the actions of Schwartz. Actually, it is amazing that Corporation Counsel failed to institute counter-claims on behalf of Petitioners against Schwartz for their injuries as a result of his assaultive behavior. Corporation Counsel was well aware of these factors, and it is telling that their papers before the District Court utterly failed to make any mention of any of these facts.

In any event, it is clear from the above, and clear from admissions contained in Corporation Counsel's papers before the District Court, even without these factors being mentioned, Corporation Counsel's initial determination to provide defense and indemnification to Petitioners had a factual basis and in that sense was not arbitrary and capricious. By contrast, Corporation Counsel failed to set forth any new evidence or facts before the District Court upon which it could base a new determination to deny a defense and indemnification to the defendant police officers.

Corporation Counsel has stated that its motion is based solely upon a changed vote of the CCRB. Corporation Counsel has not set forth any new evidence or fact upon which this vote was premised. Clearly, a vote, let alone a changed vote of the CCRB, is not, in and of itself evidence that a police officer has

violated a rule or regulation of the Police Department, or is in any way disqualified under the provisions of General Municipal Law § 50-k.

New York State Courts have refused to allow corporation counsel to withdraw as attorneys for an employee when corporation counsel has advanced no new evidence or facts upon which such a determination could be based. See, Wong v. City of New York, *supra*.

It also must be noted that the CCRB cannot make a legally binding determination that a police officer violated a rule or regulation of the police department or that a police officer is otherwise disqualified under the provisions of GML § 50-k. See New York City Charter § 440.

The attention of the Court is respectfully referred to the portion of the section which states that the CCRB shall have the power to "recommend action upon complaints" made against New York City Police Officers. By no means can it be said that the Police Department is obligated to follow the recommendation of the CCRB.

In subdivision (d) of § 440, reference is made to the role to be played by the Police Department in the CCRB process. Subdivision (d) imposed upon the Police Department three duties. First, the Police Department is obligated to provide assistance to the CCRB, cooperate fully with the CCRB, and to provide all documents and records which are necessary for the investigation of allegations brought before the CCRB.

Second, the Police Commissioner is required to insure that all uniformed members of the force and civilian employees appear before and respond to inquiries made by the CCRB and its

civilian investigators. Third, the Police Department is required to advise the Board on actions it has taken on CCRB recommendations.

To further demonstrate that CCRB determinations are mere recommendations and not mandatory in nature. The attention of this Court is respectfully referred to New York City Charter § 440(e). Clearly, any rational reading of the statute would indicate that even if one were to style the CCRB recommendation as to Petitioner Collins as a "determination," the CCRB's recommendation is not the sort of "determination" which could form a predicate for Corporation Counsel to deny representation to Petitioner Collins, let alone the other two Petitioners.

The recommendation by the CCRB is nothing more than that agency's view of the incident at issue in this case, little more than a mere indication of a CCRB's dissatisfaction with a given police officer's conduct. The CCRB's recommendation cannot constitute a new "fact" which could justify Respondent's withdrawal from its duties under General Municipal Law § 50-k.

Clearly, only the Police Commissioner can make a legally binding determination that a police officer violated a rule or regulation of the police department. The Police Commissioner may take such action only after the individual police officer has been afforded an opportunity to defend such a charge pursuant to Civil Service Law.

Moreover, there is no evidence that the Police Department itself was in any way dissatisfied with Petitioner Collins' behavior in the incident at issue. As stated above, since the incident, the Police Department has seen fit to promote Petitioner Collins to the rank of Sergeant.

In any event, mere dissatisfaction by an outside agency cannot form the basis of a denial of representation to a civil servant. The Supreme Court, Appellate Division, First Department has stated the following in Blood v. Board of Education of the City of New York, 121 A.D.2d 128 (1st Dept. 1986):

> We know of no case where mere dissatisfaction with an employee's employment-related conduct, unpursued in disciplinary proceedings, has been deemed sufficient to release the City from its defense obligation pursuant to General Municipal Law Section 50-k(2).

The Court, in Blood, went on to find that a bare claim of misconduct, which was never made the subject of formal disciplinary charges and specifications, cannot suffice as a basis for denying an employee-defendant representation by the Corporation Counsel.

Clearly, without any new evidence or factual data, Respondent's attempt to change its initial determination to represent and indemnify Petitioners must be considered to be an arbitrary and capricious act, without basis in law, and must be set aside. Given that the Courts below have seen fit to permit Respondent to evade the duty imposed upon it by New York State law, and given that a denial of the instant Writ of Certiorari could cause governmental employers to interpret such denial as sanctioning the conduct engaged in by Respondent here, it is respectfully submitted that Petitioners' prayer for relief before this Court should be granted.

CONCLUSION

For the reasons stated above, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of June, one thousand nine hundred and ninety-five.

Present:
Hon. Jon O. Newman,
Chief Judge,
Hon. Richard J. Cardamone
Hon. Fred I. Parker,
Circuit Judges.

ARTHUR SCHWARTZ,

Plaintiff,

FRANK MCDERMOTT,

Defendant,

THE CITY OF NEW YORK,

Defendant-Appellee,

V.

TERRANCE COLLINS, JOHN CARNEY and DAREN BURED, in their individual and official capacities as Police Officers employed by the New York City Department of Police,

Defendants-Appellants.

Docket no.(s): 94-9047

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the appeal be and it hereby is dismissed in accordance with the opinion of this Court.

GEORGE LANGE III, Clerk
By: s/Arthur M. Heller
Arthur M. Heller
Administrative Attorney

A True Copy
George Lange III, Clerk
s/George Lange III

Issued as Mandate/
8/31/95

United States Court of Appeals Second Circuit
Filed Jun 15 1995
George Lange III, Clerk

APPENDIX B

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

United States Court House
40 Foley Square
New York 10007

George Lange III
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day of August one thousand nine hundred and niney-five.

Present:
Hon. Jon O. Newman, CH.J,
Hon. Richard J. Cardamone,
Hon. Fred I. Parker,
Circuit Judges,

94-9047 Schwartz v. New York City

A petition for rehearing having been filed herein by Appellant Terrance Collins, John Carney and Darin Bured,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
GEORGE LANGE III, CLERK
By: s/Beth J. Meador
Beth J. Meador
Administrative Attorney

pethrg frm
p/o/CCC

United States Court of Appeals Second Circuit
Filed Aug 23 1995
George Lange III, Clerk

APPENDIX C

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1376—August Term, 1994

(Argued May 8, 1995 Decided June 15, 1995)

Docket No. 94-9047

ARTHUR SCHWARTZ,

Plaintiff,

—v.—

THE CITY OF NEW YORK,

Defendant-Appellee,

—and—

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED,

Defendants-Appellants,

—and—

FRANK MCDERMOTT,

Defendant,

in their individual and official capacity as Police Officers employed by the New York City Department of Police.

Before:

NEWMAN, *Chief Judge*,
CARDAMONE and PARKER, *Circuit Judges*.

Three New York City police officers appeal from an interlocutory order entered in the United States District Court for the Eastern District of New York, Raggi, *J.*, granting a motion by the Corporation Counsel of the City of New York for leave to withdraw as counsel for the officers. Because the order is not a final judgment and does not fall within the "collateral order" exception to the final judgment rule, the appeal is dismissed for want of jurisdiction.

JOEL BERGER, Office of Corporation Counsel, New York, NY (Paul A. Crotty, Corporation Counsel, The City of New York, Leonard J. Koerner, Pamela Seider Dolgow, Fay Ng, New York, NY, of counsel) *for defendant-appellee*.

RAYMOND E. KERNO, Lake Success, NY (Lysaght, Lysaght & Kramer, Lake Success, NY) *for defendants-appellants.*

PARKER, *Circuit Judge*:

New York City police officers Terrance Collins, John Cairney and Darren Buneo, defendants below, have filed this appeal from an interlocutory order entered on September 16, 1994 in the United States District Court for the Eastern District of New York, Raggi, *Judge*. The order granted a motion by the Corporation Counsel of the City of New York for leave to withdraw as counsel for the three officers. Because the order is not a final judgment for purposes of 28 U.S.C. § 1291 and does not fall within the "collateral order" exception to the final judgment rule, the appeal is dismissed for want of jurisdiction.

Plaintiff Arthur Schwartz sued the three officers and the City of New York City under 42 U.S.C. § 1983 after he was allegedly beaten following a minor traffic incident. Corporation Counsel for the City initially undertook representation of all defendants pursuant to New York State General Municipal Law § 50-k(2) (McKinney 1986), which provides in relevant part:

> At the request of the employee . . . the city shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court . . . arising out of any alleged act or omission *which the corporation counsel finds* occurred while the employee was acting within the

> scope of his public employment and in the discharge of his duties and *was not in violation of any rule or regulation of his agency* at the time the alleged act or omission occurred.

(Emphasis added.) Subsequently, Corporation Counsel moved to be relieved as counsel for the officers after the Civilian Complaint Review Board found that Schwartz's complaint against Collins was substantiated in important respects—in effect, that Collins had acted in violation of police department rules. Corporation Counsel also felt that, because Buneo and Cairney backed Collins's version of events, it would be a conflict to represent both the City and the individual officers. The district court granted the motion.

The collateral order doctrine is a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right. Its "reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430-31 (1985). The doctrine provides that appeals may be taken from prejudgment orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), the Supreme Court set forth three requirements to fit the exception: the interlocutory order must (1) conclusively determine the disputed question, (2) resolve an

important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

In *Richardson-Merrell Inc. v. Koller*, 472 U.S. at 431, the Supreme Court noted that the test is "strictly applied . . . when parties pursue[ ] immediate appeal of trial court rulings on motions to disqualify counsel." The Court held that an order disqualifying counsel in a civil case does not meet the *Coopers & Lybrand* test, for the following reasons:

> [I]f establishing a violation of one's right to counsel of choice in civil cases requires no showing of prejudice, then "a pretrial order violating the right does not meet the third condition for coverage by the collateral-order exception: it is not 'effectively unreviewable on appeal from a final judgment.' " Absent a requirement of prejudice, the propriety of the trial court's disqualification order can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal.
>
> . . . If [on the other hand] the nature of the right to representation by counsel of one's choice is that "[it] is not violated absent some specifically demonstrated prejudice," then a disqualification order, though "final," is not independent of the issues to be tried. Only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced.

Id. at 438-39 (quoting *Flanagan v. United States*, 465 U.S. 259, 268 (1984)).

Like the order in *Richardson-Merrell*, the order at issue here, permitting the Corporation Counsel of the City of New York to withdraw as counsel for the three officers, also fails the second and third *Coopers & Lybrand* requirements. First, whether the City is obligated to represent the officers in this action cannot be separated from the merits of the action, because the question turns in part on precisely what the officers did: if an officer's conduct was in violation of a rule or regulation of the New York City Police Department, the City (through its Corporation Counsel) does *not* have an obligation to defend the officer under § 50-k(2). Second, the order is not effectively unreviewable on appeal from a final judgment, because if it is ultimately determined that the City is obligated under § 50-k(2) to provide for the officers' defense, the City can simply be ordered to pay the officers' attorneys' fees. The officers' rights will not have been irretrievably lost in the process. After all, § 50-k(2) requires only that "the *city* shall provide for the defense" of a city police officer in certain circumstances; the statute does not require the Corporation Counsel to do so.

Accordingly, because the disputed order is not a final judgment and the requirements of the collateral order doctrine are not satisfied, the appeal is dismissed for lack of jurisdiction.

APPENDIX D

Order of the United States District Court, Eastern District of New York

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

ARTHUR SCHWARTZ,

Plaintiff,

against

THE CITY OF NEW YORK, TERRANCE COLLINS, FRANK McDERMOTT, JOHN CARNEY, DAREN BURED,

Defendants.

CV 93-3114 (RR)

Order

APPEARANCES:

PAUL A. CROTTY
Corporation Counsel
Law Department
100 Church Street
New York, New York 10007
By: Ave Maria Brennan
Assistant Corporation Counsel

LYSAGHT, LYSAGHT & KRAMER
1983 Marcus Avenue
Lake Success, New York 11042
By: Joseph B. Baumgartner

MATTHEW FLAMM
26 Court Street
Suite 600
Brooklyn, New York 11242
Attorney for Plaintiff

RAGGI, District Judge:

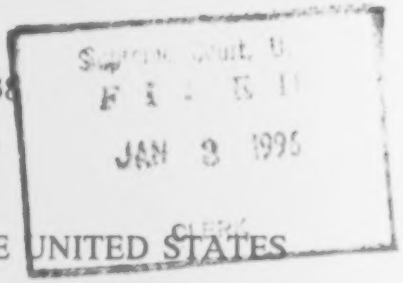
For the reasons stated on the record of oral argument held September 16, 1994, the motion by Corporation Counsel to be relieved as counsel for the individual defendants is GRANTED. Plaintiff is to arrange for a status conference before the assigned Magistrate Judge in approximately 30 days so that the parties, and new counsel, can discuss the status of discovery. Corporation Counsel is to file an affidavit with the court on or before October 7, 1994 detailing the steps taken by Corporation Counsel to ensure that any confidential information pertaining to the individual defendants is not known by the Assistant Corporation Counsel now handling this case on behalf of New York City.

So Ordered.

Dated: Brooklyn, New York
September 16, 1994

s/REENA RAGGI
REENA RAGGI
United States District Judge

No. 95-83



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED, in their individual and official capacity as Police Officers employed by The New York City Department of Police,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LEONARD J. KOERNER,*
JOEL BERGER,
PAMELA SEIDER DOLGOW,
FAY NG,
of Counsel.

PAUL A. CROTTY,
Corporation Counsel
of the City of New York,
Attorney for Respondent,
100 Church Street,
New York, New York 10007.
(212) 788-1034 or 1065

*Attorney of Record
December 27, 1995

COUNTER-QUESTION PRESENTED

Whether the District Court's interlocutory order granting the New York City Corporation Counsel leave to withdraw as petitioners' counsel constitutes a "collateral order" subject to immediate appeal under 28 U.S.C. § 1291?

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No. 95-838

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

TERRANCE COLLINS, JOHN CARNEY and DARIN BURED, in their individual and official capacity as Police Officers employed by The New York City Department of Police,

Petitioners,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

(a)

In this 42 U.S.C. § 1983 action, plaintiff Arthur Schwartz ("plaintiff") alleges, *inter alia*, that defendants-petitioners Terrance Collins, John Carney and Darin Bured,

police officers employed by defendant-respondent, the City of New York, used excessive force against him.

By order dated September 16, 1994, the United States District Court for the Eastern District of New York (Raggi, U.S.D.J.) granted the New York City Corporation Counsel's motion to be relieved as petitioners' counsel in this action. Thereafter, petitioners filed a notice of appeal taking an appeal "as of right" from the District Court's interlocutory order.

Petitioners seek to have this Court review by way of certiorari an order of the United States Court of Appeals for the Second Circuit, entered June 15, 1995, which dismissed petitioners' appeal. The Court of Appeals held that the District Court's order was not subject to immediate review pursuant to 28 U.S.C. § 1291 because (1) it was not a final order and (2) the order did not constitute a "collateral order".

(b)

In his complaint, plaintiff alleged that on April 16, 1992, at approximately 11:00 A.M., he was parked at a "no standing" zone (19, ¶ 11).[1] While plaintiff was inside a store, he discovered that petitioner Police Officer Collins ("Collins") was issuing a parking ticket for his vehicle. Plaintiff immediately ran out of the store and got into his vehicle. At that point, petitioner Collins advised plaintiff that if he drove away, the ticket would be mailed to him. In response, plaintiff

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[1] Numbers in parentheses refer to pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit; numbers preceded by the letter "A" refer to the Appendix annexed to the Petition for a Writ of Certiorari.

"told him to do what he had to do and then drove away" (19-20, ¶ 11).

Petitioner Collins then followed plaintiff on his scooter. When plaintiff stopped at a traffic light, plaintiff asked Collins why he was following him. At that time, "words were exchanged and Collins said he was going to charge Schwartz [plaintiff] with disorderly conduct" (20, ¶ 14). Plaintiff again told Collins that he could do what he wanted to do and then drove away (20, ¶ 14).

Petitioner Collins continued to follow plaintiff until he parked at a location, approximately four blocks from where the initial exchange occurred. At that point, Collins "pulled up very close" to plaintiff's vehicle, got off his scooter, and walked to the driver's side. He told plaintiff that he was under arrest and to get out of the vehicle (20, ¶ 15). Plaintiff further alleged that "Collins then opened the car door, and reached in and began to pull" him out of the car (20, ¶ 15).

Petitioners Police Officers Carney and Bured, who were parked across the street, then came over. As "Collins was pulling plaintiff out of the car, one of the other defendants [petitioners] pushed plaintiff from behind, causing Collins and Schwartz to fall with the other defendant [petitioner] falling on top of them" (20-21, ¶ 17).

Plaintiff was then handcuffed and placed face down on the ground. One of the petitioners then allegedly struck plaintiff in the back of his head with a nightstick, repeatedly kneed or kicked him in his abdomen and ribs and stood on plaintiff's wrists and head (21, ¶ 18).

Thereafter, plaintiff received medical treatment at Coney Island Hospital (21, ¶ 19). According to plaintiff, his face, head, wrists, hands and ribs were injured during this incident. Further, stitches were necessary to close wounds on his scalp and chin (22, ¶ 21).

Plaintiff commenced this action on or about July 12, 1993, against the City and petitioners Collins, Carney and Bured.

(c)

On January 24, 1993, plaintiff filed a complaint with the Civilian Complaint Review Board (CCRB) regarding the above incident (96). The CCRB is an agency independent of the Police Department which has the power to "receive, investigate, hear, make findings and recommend action upon complaints" by the public against police officers, alleging misconduct involving, *inter alia*, excessive use of force, abuse of authority, discourtesy, or use of offensive language. The findings and recommendations of the CCRB are forwarded to the Police Commissioner. New York City Charter, § 440(c)(1).

The Office of the Corporation Counsel of the City of New York ("Corporation Counsel") initially determined that it would represent the petitioners as well as the City in this action. At the time the office made this decision, the charges against the petitioners had not been substantiated by the CCRB.

Subsequent to the filing of the answer, however, on November 17, 1993, the CCRB substantiated several of the charges against petitioner Collins and recommended that the Police Department initiate disciplinary charges against Collins.

The reasons for the substantiation of the charges against Collins were summarized by one of the CCRB Members, a former New York City Police Commissioner, who stated (92-93):

> Collins was a scooter officer attempting to issue a summons to complainant who drove off. Collins gave chase, called for back-up and engaged in an altercation & physical struggle with a motorist in order to issue a summons. Complainant, unexplainably winds up in hospital. Credibility is with the complainant... Unnecessary chase [,] unnecessary confrontation[,] unnecessary arrest.

The charges against petitioners Bured and Carney were unsubstantiated.

(d)

Thereafter, the Corporation Counsel's Office reconsidered its determination to represent petitioners in light of the subsequent finding by the CCRB substantiating certain charges against petitioner. Pursuant to New York General Municipal Law § 50-k, the City shall provide for the defense of a City employee where the Corporation Counsel has determined that the "employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of his agency at the time the alleged act or omission occurred."

In a letter dated March 9, 1994, the Corporation Counsel's Office informed petitioner Collins that based on a "consideration of facts that have arisen subsequent to September 1993, *i.e.* the findings of the Civilian Complaint Review Board, we have concluded after careful consideration that we are unable to continue to represent you in this matter" (38).

The Corporation Counsel's Office also determined that it could not represent petitioners Carney and Bured because its "continued review reveals that these two officers essentially support Officer Collins in this matter" and, therefore, the Office's continued representation of these two officers would present a conflict (44).

Thereafter, the Corporation Counsel's office moved to be relieved as counsel for petitioners (7-44).

OPINIONS BELOW

(a)

The District Court Opinion

In granting the Corporation Counsel's motion to withdraw as attorney for petitioners, the District Court reasoned that under General Municipal Law § 50-k and judicial precedents, the Corporation Counsel is to make the determination whether to represent, and his determination regarding representation cannot be set aside unless it is arbitrary and capricious. The Court found that the Corporation Counsel's determination that it could not continue representation of petitioners in this case was not arbitrary and capricious.

(b)

The Opinion of the Court of Appeals

The Court of Appeals for the Second Circuit dismissed petitioners' appeal on the grounds that "the order is not a final judgment and does not fall within the 'collateral order' exception to the final judgment rule" (A6).

The Court of Appeals, citing this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), noted that in order to fall within the narrow "collateral order" exception, an order must satisfy three requirements: it must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment (A8-A9).

The Court then concluded that the District Court order permitting Corporation Counsel to withdraw as counsel failed to meet the second and third *Coopers & Lybrand* requirements. The Court reasoned (A10):

> First, whether the City is obligated to represent the officers in this action cannot be separated from the merits of the action, because the question turns in part on precisely what the officers did: if an officer's conduct was in violation of a rule or regulation of the New York City Police Department, the City (through its Corporation Counsel) does *not* have an obligation to defend the

officer under § 50-k(2). Second, the order is not effectively unreviewable on appeal from a final judgment, because if it is ultimately determined that the City is obligated under § 50-k(2) to provide for the officers' defense, the *City* can simply be ordered to pay the officers' attorneys' fees. The officers' rights will not have been irretrievably lost in the process [italics in the original].

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court of Appeals properly applied the analysis set forth by this Court in determining that the District Court interlocutory order permitting the Corporation Counsel to withdraw as petitioners' counsel did not constitute a collateral order subject to immediate appeal pursuant to 28 USC § 1291.

Petitioners have not presented a compelling question to be reviewed by this Court. This Court, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), set forth the three requirements which an interlocutory District Court order must satisfy to constitute a collateral order subject to immediate review pursuant to 28 USC § 1291.

Petitioners do not contend that the Court of Appeals applied the wrong standard. Rather, petitioners seek review because the Court of Appeals allegedly misapplied the *Coopers & Lybrand* analysis. As set forth in Rule 10 of this Court's Rules, however, the "misapplication of a properly stated rule of law" is rarely the basis for the granting of a writ of certiorari.

In any event, the Court of Appeals properly determined that the District Court order does not meet the second and third requirements of the "collateral order" exception. First, the order does not satisfy the second prong of the *Coopers & Lybrand* inquiry since the determination as to whether the Corporation Counsel had a rational basis to withdraw as counsel for petitioners is not "completely separate from the merits" of the underlying action. The Corporation Counsel's Office determined that it could no longer represent petitioner Collins because his conduct violated a rule or regulation of the New York City Police Department. This was based on the CCRB's findings substantiating certain charges against Collins. The conduct complained of in the CCRB charges is the same conduct which is the basis of the instant action. With respect to petitioners Bured and Carney, the Corporation Counsel's Office determined that there would be a conflict if it continued to represent these officers because their version of the facts apparently supports Collins. Clearly, the determination as to whether Collins in fact violated a rule or regulation is entwined with the merits of the underlying litigation. Thus, the second prong of the test has not been satisfied since the merits of this appeal are not completely separate from the merits of the underlying action.

Additionally, the District Court order does not meet the second prong of the test because a determination as to whether petitioners have been prejudiced by the Corporation Counsel's withdrawal as counsel can only be made after there has been a resolution of the underlying action. In *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985), this Court held that an order disqualifying an attorney from representing a party did not constitute a collateral order for this very reason. This Court stated (472 U.S. at 438-439):

> If the nature of the right to representation by counsel of one's choice is that "[it] is not violated absent some specifically demonstrated prejudice," *ibid.*, then a disqualification order, though "final," is not independent of the issues to be tried. Only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced. If respondent were to proceed to trial and there receive as effective or better assistance from substitute counsel than the disqualified attorney could provide, any subsequent appeal of the disqualification ruling would fail. ... [Thus] the disqualification ruling would be inextricably tied up in the merits.

The District Court order relieving Corporation Counsel as petitioners' counsel in this case is analogous to an order disqualifying an attorney. In both situations, the client's choice of counsel is affected.

This Court in *Richardson-Merrell, Inc. v. Koller*, held that an order disqualifying an attorney not only failed to meet the second prong of the *Coopers & Lybrand* analysis, but also the third condition of the "collateral order" exception because such an order can be effectively reviewed on appeal from a final judgment.

Any argument that the District Court order in this case is distinguishable from a disqualification order because it denies petitioners not only of their choice of counsel but "free" counsel would be meritless. First, such an argument would be disingenuous since the PBA's counsel would provide representation in such cases (44). As a result of collective bargaining, the City makes a per officer contribution to a civil legal representation fund which is administered by the PBA. The purpose of this fund is to provide legal representation to police officers in the defense of civil litigation where the officer is not represented by the Corporation Counsel.[2]

Further, as the Court of Appeals reasoned in this case, the District Court order "is not effectively unreviewable on appeal from a final judgment, because if it is ultimately determined that the City is obligated under § 50-k(2) to provide for the officers' defense, the City can

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[2] In fact, PBA counsel represented petitioners before the Court of Appeals and are presently representing them before this Court.

simply be ordered to pay the officers' attorneys' fees. The officers' rights will not have been irretrievably lost in the process" (A10).

Contrary to petitioners' argument (Petition, pp. 12-13), the Second Circuit's decision in this case is not inconsistent with its earlier decision in *Mercurio v. City of New York*, 758 F.2d 862 (2d Cir., 1985). Even if it were, this would not be a basis for the grant of a writ of certiorari since a court may depart from its own precedents.

In sum, petitioners have not presented a compelling question to be reviewed by this Court since they are merely alleging a "misapplication of a properly stated rule of law." Further, the Court of Appeals properly dismissed petitioners' appeal from the District Court's interlocutory order granting Corporation Counsel permission to withdraw as petitioners' counsel. The order does not constitute a "collateral order" because (1) the merits of this appeal are entwined with the merits of the underlying action and (2) the order is "not effectively unreviewable on appeal from a final judgment."

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel
of the City of New York,
Attorney for Respondent.

LEONARD J. KOERNER,*
JOEL BERGER,
PAMELA SEIDER DOLGOW,
FAY NG,

of Counsel.

*Attorney of Record